BOKO HARAM AND THE LAW: AN APPRAISAL OF THE RULE OF LAW-BASED AND THE SECURITY-BASED APPROACHES TO COUNTERTERRORISM

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1. Introduction

The events of the 11th of September, 2001,(9/11), in the United States marked a significant turn-around in the legal as well as political approaches to the phenomenon of terrorism or insurgency as a crime and as an ideological tool in the hands of groups to push for or ramrod their political or other world view-point down the throats of the general society. Prior to those violent attacks, terrorism or insurgency used to, for the most part, be a state's domestic law preoccupation tackled through the normal justice mechanism within the framework of national constitutions. Here readily comes to mind the examples of Timothy Mcfeigh's Oklahoma City bombing[1] and the1995 Arizona[2] terror attacks on the American soil both of which were treated as domestic and using established legal measures in dealing with them during and after the events. Cases of terror attacks recorded earlier on in the last century did not suffer a different approach[3]. Dissidents and irredentist groups even while engaged in armed insurrection were treated as no more than domestic insurgents, as in the case of Ku Klu Klax[4], and eventually dealt with in line with all the complements of rights provided by municipal constitutions and international law.

In the wake of 9/11 however, armed belligerency by individuals and groups with ideological underpinnings, assumed international political dimension. With the rhetorical identification of "rogue states" as sponsors of terror, the normative definition of who a terrorist is and what acts constitute terrorism became further enlarged and no less complex. This is compounded by the trans-border and trans-continental dimension assumed by the phenomenon engendered by globalization and aided by technological and information revolution of the twenty-first century. Catalyzed by these international geographic, scientific and political factors, the scene became well set for international legal promulgation, and thus by a resolution in 2008[5], the United Nations made far-reaching provisions relating to international terrorism. Significantly, the contents of the UN resolution goes beyond the global security that it seeks to ensure through

1 www.history.com/oklahoma-city-bombing. Accessed on 23rd March, 2016
2 Ibid.
3 www.johnstonsarchive.net/terrorism. Accessed 23rd March, 2016
4 http://netwar.wordpress.com/2007/08/06thekukluxklaninsurgency. Accessed 23rd March, 2016
5 UN Res/62/277 on Global Counter-Terrorism Strategy, 2008

international collaboration against acts of terror, but also reaffirms the resolve of all nations toward safeguarding the human rights and dignity and upholding the principles of rule of law as enshrined in domestic bills of rights of states even in the face of daunting terrorist threats.[6]

Confronted by its own internal violent extremism in the nature of what has come to be known as Boko Haram[7], Nigeria was among the first states to sign the anti-terror treaties, a part of global community's efforts to curtail and deal with terrorism. Sequel to that, Nigeria enacted the Terrorism Prevention Act of 2011, later amended in 2013. By its section 1A(2)(a) and (b), the Attorney General of the Federation is obligated to ensure the implementation of the Act as well as see to its compliance with international policies and standard in counter terrorism. Still, this has not stopped the Boko Haram group from snowballing into an armed and violent anti-state group with security agents and other state symbols as its initial adversaries. Boko Haram gained international prominence and attention in April 2014 with the abduction of over 200 school girls from their dormitory at Chibok in northeastern Nigerian state of Borno[8].

Having initially underrated the military prowess of the group through the dearth of reliable intelligence, ineffective and corrupt bureaucracy, incoherent policies and numerous policy somersaults, Nigerian authorities found themselves in an embarrassing international limelight. Seemingly under intense pressure to act, Nigeria employed (and perhaps still do), a scorched-earth approach using blind military might oblivious of collateral damages and losses of innocent lives and property and unconcerned with accuracy of target before attack.[9] As a fallout of this strategy, many villages were sacked, razed and ransacked. Women, children, sick and the weak in thousands were felled by sate's own bullets.[10] At a point, the civilian victims were at a loss of whom to dread more between the ransacking insurgents and the indiscriminately bulldozing military[11]. Reports of grotesque extra-judicial decapitations were common as much against the militants as against the security agents.[12] And despite thousands of arrests and indefinite detentions, only a handful have as at now after many years, been charged to court, against all

6 http://www.un.org/en./terrorism. Accessed on 23rd March, 2016
7 Abdullahi, D. (2016) *The Boko Haram Phenomenon and Terrorism in Nigeria*. Hiit Plc. Lagos.
8 www.aljazeera/com/news2015/08. Accessed 23rd March, 2016
9 www.amnesty.org.uk/cameroon. Accessed 27th March, 2016
10 www.christiantoday.com/articles. Accessed 27th March, 2016
11 Ibid.
12 International Commission of Jurists (ICJ), *Global Security and Rule of Law.* Available at www.icj.org/themes

known national and international laws. This strategy (or lack of it) however, does not appear to be succeeding in nipping the targeted insurrection in the bud.

Nevertheless, the employment of the outlined method of engagement by authorities, is as much from desperation, ill-preparation and ill-plan, as it is from confusion regarding the acceptable or suitable *modus operendi* employable in novel security challenges in the nature of which we are faced with today and such is not limited to the Nigeria's experience. For instance, in the aftermath of the September 11th attacks, the United States (US) seemed to have jettisoned any notion of civil liberties in its war against terror ignoring all its Fifth Amendment and other rights guaranteed by its constitution and other laws as well as those binding on it under international law.[13] Today Guantanamo Bay is still open, harbouring many detainees without trial for up to 10 years despite universally being recognized as infamous and indicted for the employment of most bizarre, cruel and inhuman interrogation methods.[14] The US also still uses unmanned drones for aerial bombardments against amorphous targets with the attendant collateral damages.[15]

The above US-type approach is called security-based approach to terrorism [16]. In it, blind military might as against legal restraint has the upper-hand in keeping with the extraordinariness of the threat posed. The converse approach is the principle-based/rule of law-based approach.[17] It places the law and due process and human rights first irrespective of how dire the threat faced is.[18] This latter approach, which is basically prosecutorial and rights-based might seem to have been employed by European countries, particularly the United Kingdom (UK), after the 7th July, 2005 attacks. Still, the efficacy of one approach, over the other may largely depend on the overall objective, short, long or medium terms. It may also have a lot to do with the political environment, political intrigues and preferences at play of the decision makers.

2. Rule of Law-based versus Security-based approach: the concepts

As stated above, rule of law-based approach to counter terrorism also known as principle-based method, refers to the culture of sticking to laid down procedure in crime management, prevention, detection and apprehension by strict adherence to legal requirements including

13 www.hrw.org/legacy/chr59. Accessed 27th March, 2016
14 www.amnestyusa-org/ourwork/issues. Accessed 29th Marc, 2016
15 www.truth-net.org/opinion/item. Accessed 3rd April, 2016
16 www.globalcounter-org/events/opportunitiesandchallenges. Accessed 5th April, 2016
17 Ibid.
18 Ibid.

respect for the human rights of even the perpetrators. It is an age-old tradition that came to be observed and respected by modern world after the devastations and chaos manifested in and surrounding armed conflicts in many parts of the world prior and subsequent to the two world wars witnessed in the last hundred years or so. Jolted by the gory devastations engendered by unregulated human conduct in armed conflict, the world gave itself code of ethics strictly observable, which virtually embodies basic human rights and other due process requirements. In the last hundred years, by and large, effort was institutionally made to factor in such rules in armed confrontations by states; until the "war on terror" appears on the scene.

On the other hand, security-based approach to counter terrorism connotes the employment of extra-legal and extra-procedural approach to tackling and combating terrorism or related crimes. By this method, on the basis of novelty and extraordinariness of situation which requires extraordinary response, due process is put at abeyance, procedure circumvented, and legal and human rights suspended or even flagrantly debased in an effort to reach the target and demobilize the culprits. Following this method, anything is doable, illegality notwithstanding, as long as the mischief is countered or stopped on its suspected tracks. The ends justify the means. Today, many counterterrorism legislations assume this new configuration in giving cover to the new methods, oblivious of prior international and domestic law obligations whose meticulous proceduralism, but sure efficacy, is being blunted.

3. **The Debates**

Several scholarly debates have ensued regarding the derailment from adherence to traditional due process in counterterrorism operations after 9/11 and its long term repercussions not only on societal well being but also on the sustainability of the short term gains of the security-based measures that seem to spur wholesale deviation from tested and procedurally accepted standards.

One such critique is Harvard College's[19] investigation of the practice of preventive (indefinite) detentions, that characterised anti-terrorism investigations in the aftermath of the 9/11 attacks, both in the United Kingdom and the United States. It particularly highlights how suspects were

19 Harvard College, *Due process protection in the War on Terrorism in the United States and the United Kingdom.* Harvard College, 2012. Available at www.gov.harvard.edu.files. Accessed on 24rth March, 2016.

detained indefinitely at the dreaded Guantanamo Bay facility without trial for years on end under the guise of safeguarding national security thereby pushing aside due process and individual rights which form "foundational norms of liberal democracies."[20] Tracing the state of affairs to the less than adequate guidelines provided by the international laws of war, particularly the Geneva Conventions, which primarily regulate armed confrontation between states, the research surmises thus:

> Hence, the legal situation remains unclear in terms of how states should address the problem of terrorist non-state actors. The traditional armed conflict model is difficult to apply because of terrorists disregard for the laws. Democratic states may face a dilemma between effectively addressing terrorism through extralegal draconian measures and remaining compatible with the rule of law.[21]

Many states thus, capitalize on the lacuna in the international law to circumvent even domestic process requirements of, for instance, *habeas corpus* or judicial review in case of indefinite detentions.[22] Today, the US is in a dire and embarrassing dilemma regarding how to close the Guantanamo Bay and to "dispose" of its contents. However, having briefly treaded the said path, the government of the United Kingdom was forced to backtrack to process-based system of detention when the policy was struck down by British courts and in its place sufficient process enacted.[23] Such processes include access to judicial review, review of detentions by state, periodic review of detention and release of the detainees when detention becomes no longer necessary.[24] This singular judicial act of the United Kingdom served as a saving grace for the latter in narrowly avoiding the legal and moral dilemma faced by the United States concerning Guantanamo Bay and the fates of its occupants which have become an embarrassment and an open wound on the conscience of a humane world.

With our tendency in Africa to toe the line of the USA in virtually all sphere of human endeavour, evidence of the adoption of a US-style counterterrorism is already present and legal scholars have taken interest to examine its effect on peace and security on the continent. This principally concerns the human rights culture which, even in normal situation, is far from ideal. On this, Ford[25] analyses the impact of current counter-terrorism strategy on the human rights

20 Ibid. p.2
21 Ibid.
22 Ibid, p.4
23 Ibid. p.5
24 Ibid. p.4
25 Ford, J. (2013). *Counter-Terrorism, Human Rights and the Rule of Law in Africa*. Institute for Security Studies, Paper 248. Accessed at www.issafrica.org. 23rd March, 2016.

culture in Africa. Highlighting the efforts of the United Nations to, after the 9/11, ensure that counter-terrorism strategies reflect the observance of established human rights and general international law, Ford concludes that with the universalization of the phenomenon of terrorism and its certain spillage into African continent, the chances of blanket labeling of any political dissent as terrorism to justify its suppression without due process, is high.[26] In his words:

> After 2001 (and contrary to the UN framework), a more permissive global counter-terrorism environment prevailed. Some African governments took advantage of the cover of global counter-terrorism approaches to pursue domestic opponents. At the same time, some donors focused narrowly on counter-terrorisms at the expense of broader rule of law.[27]

He also predicts the tendency of African leaders to leverage on counter-terrorism mechanisms to, not only trample on legitimate dissent, but to also circumvent procedure and denigrate rights, actions likely to lead to the escalation of the problem, by way of radicalization, rather than checkmate the mischief. Such approach will also undermine the state's legitimacy and moral authority with the attendant social and political consequences.[28] Espousing a deviation from the US post 9/11 tone and security-based approach, he makes a case for the adoption of principle-based approach founded on procedure and rights respects as the best guarantee of long term success especially drawing from the experience of North Africa during the Arab Spring when militarized response only aggravated the uprisings.[29] Also the radicalisation engendered by the extra-judicial killing by Nigerian authorities of Boko Haram's Mohammed Yusuf in 2009, according to him, only gave the insurgents the excuse needed to denounce allegiance to the Nigerian state and become unflinchingly violent.[30]

Ford is hopeful of other African states drawing from Nigeria's negative experience in initially handling Boko Haram militarily, to avoid getting ensnared in long-drawn struggles with terrorists elements radicalized by state's poor and brawny response. This may however be doubtful in view of the recent handling of Army/Shiites clash in Zaria of 12th December, 2015[31] which response did not differ from the events of July 2009 in Maiduguri. The same approach has also been replicated of recent in tackling Indigenous Peoples of Biafra, (IPOB)'s renewed irredentist

26 Ibid. p.1
27 Ibid. p.2
28 Ibid. p.3
29 Ibid. p.4
30 Ibid. p.5
31 "Investigation on Army, Shiite Clash Ongoing-ICC" in *Daily Trust Newspapers* of Wednesday, 23rd November, 2016, First Column,p.3

agitations[32]. Though still evolving, the approach has so far been anything but principles-based. This compounding dilemma can be said to be a result of unquestioned adoption of strategies employed by other states without taking into account our own fragility and social peculiarities. To check this trend, Ford, makes a case for internalization of approach relating to counter-terrorism rather than externalizing same by following foreign trends or rhetoric on transnational counter-terrorism campaigns.[33]

Another issue that agitates the minds of legal scholars is the tendency of states to assume that they owe a higher duty to safeguard the so called "national security" as against personal liberty of the individual. To writers like Rix,[34] this betrays a misunderstanding of the place and significance of both important concepts on the state's part. While recognizing the state's responsibility, to ensure the security and freedom of the state from terrorism and other violent crimes, he posits that the same state actually have a higher responsibility of safeguarding the personal liberty of the individual as the notion of national security itself is for safeguarding the individual not only against violent crimes by wayward groups but also against state repression. Hence, the duty of the state is not to just balance, but to prioritise personal liberty over national security claims. According to him "….the protection of human rights and the rule of law is effectively the defence of national security".[35] Rix, further amplified that position by relying on the statement of Aharon Barak of Israeli Supreme Court quoted in Kirby J., as follows: "'There is no security without law. Satisfying the provisions of the law is an aspect of national security'".[36]

Against this backdrop thus, Rix dismisses the human rights inhibiting aspect of Australia's anti-terrorism Act of 2005 and the Asio Act that allow for detentions without trial, compulsion to give evidence, and arrest and detention of persons without suspicion as being contrary to Australia's international treaty obligations, if not inconsistent with its domestic rights legislations.[37]

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32 Ibid.
33 Ford, J. op.cit.
34 Rix, M. Australia and the "War against Terrorism". Terrorism, National Security and Human Rights, in Michael, M.G. (2007) (ed.) *Proceedings of the Second Workshop on the Social Implications of National Security: From Dataveillance to Uberveillance and the Real Politik of the Transparent Society*. University of Wollangon, pp.97-112. Available at http://ro.uow.edu.au/qsbpapers/7. Accessed 30th March, 2016
35 Ibid. p.2
36 Ibid.
37 Ibid. p.8

Although Nigeria's Terrorism Prevention Act (as amended) has tried to curtail impunity by mandating the Attorney General of the Federation to ensure compliance with international law obligations, the practice belies the law as evident in persistent indefinite detentions and little prosecution of suspects.

Rix aptly captures the usual misgiving that gives rise in counterterrorism efforts when, often needlessly, states enact provisions in response to the phenomenon which often offend prior and overriding existing legislations. His allusion to the "irony of state risking becoming the terrorist" itself when it disregards liberties and thereby becoming indistinguishable from the renegade groups with arms, raises another interesting dimensions to the role of law as not only a safeguard to individual rights and liberties, but also as a yardstick for state legitimacy.

The message of Rix above is clear to the effect that the distinguishing feature between criminal terrorist groups and legitimate states is respect for individual liberties at all times. A state can easily cross the line and join the ranks of terrorists as a state terrorist, a term not new in legal and right literature. And although that is initially cloaked with the cover of state authority and legitimacy, in time the veil would be lifted when society stands in revolt against impunity as happened in some South American states under their past military juntas. Things become worse when the judiciary stands aloof or joins in the fray by justifying what clearly is illegal in order to pacify the executive.

4. Conclusion

Since the promulgation of the Geneva Conventions and their ratification by virtually all modern states, the place of the rule of law and human rights in and during armed conflicts has been secured. States have thereby agreed to abide by a code of behaviour even in the unruly atmosphere of war and to be accountable for their infraction in their conducts at the war theatre thereafter.[38] The Nuremberg trials[39] of war criminals in the wake of the Second World War and the subsequent establishment of international criminal tribunals and the International Criminal Court(ICC) by the Rome statutes[40] to adjudicate over war crimes point to the seriousness with

38 Common Article 1, Geneva Conventions
39 www.history.com/topics/nuremberg-trials. Accessed on 23rd March, 2016
40 Preamble to the Rome Statute. Available at www.ict-(p)int/PIDs/UC.eng

which the provisions of the international law that regulate armed conflict are held by international community.

Faced with the contemporary international terrorism however, especially as witnessed from the 9/11 attacks in the United States,[41] the attitude of the actors does not seem to be one of emphasis on the application of the set standard witnessed in conventional warfare between states, perhaps due to the uniqueness of the threat presented by contemporary terrorism.[42] From America to Nigeria, the approach seemed to be more militaristic than legalistic, with the attendant non-observance of procedure during and after the conflict. There appears to be little interest in following up the judicial process even after the cessation of hostilities as evidenced in the non-trial of most Guantanamo detainees and Boko Haram detainees presently. In the immediate short term observable, the militaristic or security-based approach may seem to have rolled back the potency of the threat, but this is ephemeral and the state ends up institutionalizing impunity and ultimately risks becoming a terrorist itself. The state then loses legitimacy and chaos result.

Additionally, because security-based approach tackles the symptoms rather than the underlining ailment, the short term success of crushing the rebellion by scorched earth means may turn out to be a pyrrhic victory when the mischief resurfaces in another more deadly form. Nigeria witnessed this in the metamorphosis of Boko Haram from stick-wielding irate citizens to bomb carrying and rocket firing militants capable of overrunning scores of local government areas and marshalling territories. And perhaps, had the United States been judicially methodical and less inhuman, Alqaeda might not have transformed into ISIS, holding at least three countries (Syria, Iraq and Turkey) to ransom and occupying a large territory while daring the world nuclear powers in open combat with no end in sight.

Furthermore, in the case of Nigeria, the Attorney General of the Federation must live up to the responsibility placed upon his office by section 1A subsection (2) of the Terrorism Prevention Act aforementioned, by seeing to the strict compliance with the provisions of international law and best practices in the conduct of counterterrorism activities by security agencies and the likes despite any pressure from any security quarter to the contrary.

41 Ibid.
42 Ibid.

In all this, the UK’s example suffices for states: regain your comfiture, resist the provocation and revert back to the basics of criminal procedure approach to all crimes for lasting solutions.